



PATENT

ATTORNEY DOCKET NO.: BIT-12

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: ) Examining Attorney: Raymond W. Addie  
ANTHONY S. BRADLEY )  
Serial No.: 09/612,810 ) Group Art Unit: 3671  
Filed: July 10, 2000 )  
Title: APPARATUS AND METHOD FOR DEPLOYING GEOTEXTILE TUBES )

MAIL STOP APPEAL BRIEF - PATENTS  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

REPLY BRIEF TO THE SUPPLEMENTAL EXAMINER'S ANSWER

Sir:

In accordance with 37 C.F.R. §§ 41.43(b) and 41.41, Applicant hereby replies to the Supplemental Examiner's Answer mailed on July 25, 2006.

Initially, it must be noted that though none of independent claims 1, 6, 16, 22, 23, 25, 31, 35, 36, 42 and 45, was amended after January, 2002, the bases of their rejections under Section 103(a) were changed from the bases in the April, 2002 Final Action to the changed bases in the September, 2005 Examiner's Answer. Which begs the question, if these claims were obvious to persons of ordinary skill, then why has the Office, with the benefit of hindsight, needed to change the bases for their rejections?

On page 1 of the Supplemental Examiner's Answer, it is contended that:

Appellant has ignored the fact the claims do not specify nor limit what is equivalent to the claimed "fill material solids"; required in all the claims.

Hepworth et al states at column 1, line 25 that “the filler may be sand, gravel, cement, etc.” Surely the Examiner does not contend that Hepworth et al fill material solids does not include gravel? For the Examiner to read Hepworth et al as somehow selectively excluding gravel would contradict the express terms of the Hepworth et al reference.

Moreover, it is not necessary to separately define “fill material solids” in the claims, which are interpreted according to how one of ordinary skill would understand this phrase, which would include such things as sand, cement and gravel. If this was a situation where Hepworth et al did not disclose gravel, perhaps the Examiner’s argument would have some merit. However, Hepworth et al does disclose gravel, and that is its teaching in combination with Dooleage. For the Examiner to say that somehow for purposes of the rejection, Hepworth et al leaves out the gravel, is a selective reading of Hepworth et al that is not permitted.

As to the first sentence on page 2 of the Supplemental Examiner’s Answer, which states:

A very close review of the Dooleage patent does not appear to support Appellant’s allegations of the destructive nature of gravel on Dooleage’s bags.

Strangely, the Supplemental Examiner’s Answer fails to disclose what such “very close review of the Dooleage patent” reveals in this context. Such failure itself is revealing of the inadequate support for the contention that the person of ordinary skill would be motivated to extract selective teachings from Hepworth et al and combine them with selected portions of Dooleage in order to render Appellant’s claims invalid under Section 103(a) of the Patent Code.

In the last paragraph on page 2 of the Supplemental Examiner's Answer, it states:

Hence, since all but claim 35 do not require "the barrier", or in the alternative "the dam" to be in a water environment, the argument about buoyancy in a water environment is moot.

However, the Supplemental Examiner's Answer apparently mistakes the significance of the buoyancy argument. The rejection seeks to combine Dooleage with Hepworth et al.

It is an indisputable fact that Hepworth et al pertains to a bag that can be filled in situ "below water level." See Hepworth et al column 1, lines 9-12 and 49-52; column 2, lines 10-11. Thus, the water-filled bags 11, 12 of Dooleage cannot function as ballast in the stated water environment of the Hepworth et al devices. Hence, to the person of ordinary skill, these facts do not suggest seeking to combine aspects of Hepworth et al with selected aspects of Dooleage.

The first sentence of second paragraph on page 3 of the Supplemental Examiner's Answer states:

The preamble does not define the limitation "water environment" . . . .

Again, the phrase "water environment" in the preamble must be read in the context of that which would be understood by a person of ordinary skill in this art.

The third paragraph on page 3 of the Supplemental Examiner's Answer states (emphasis in original):

Hence, if water is permitted to flow into and out of the ballast tubes, of both Appellant's invention and that of Dooleage; then Dooleage's use of water as a ballast can not be disavowed by Appellant since Appellants' invention is intended to permit the passage of water into and out of the ballast tubes of Appellant's invention.

However, this statement presents a false premise. That false premise is the assertion that water is permitted to flow into and out of the bags of Dooleage. To the contrary, Dooleage does not permit water to flow into and out of the Dooleage bags 11, 12. That is because the envelope that defines each of the Dooleage bags 11, 12 is formed of water impermeable material. Hence at Dooleage column 2, lines 33-34 states: "impermeable bags 11 and 12," and thus "impermeable" means that water cannot flow into and out of the bags disclosed in Dooleage.

The first sentence in the last paragraph on page 3 of the Supplemental Examiner's Answer states:

Therefore if the claim requires water to be "capable of moving into or out of the ballast tubes" and the prior art teaches water disposed inside a tube, the tube must be a ballast tube; since the teaching meets the requirements of the actual claim language.

Plainly, this statement is illogical and untrue.

Lines 13-16 of page 4 of the Supplemental Examiner's Answer state:

Obviously, depending upon the intended use of the - - barrier bags - - of Dooleage, it would be obvious to fill said bags with any common ballast material, such as water or sand, solely dependent upon the anticipated wave energy or lack thereof, as explicitly disclosed by Dooleage.

This conclusory statement is based on hindsight that is not supported by a fair reading of the disclosure of Dooleage and Hepworth et al. The double use of "obviously" and "obvious" in this sentence cannot substitute for proof based on a reasonable reading of what Dooleage teaches to the person of ordinary skill and what Hepworth et al teaches to the person of ordinary skill. Moreover, it is erroneous to state, as this sentence

apparently attempts to do, that Dooleage in any way teaches filling its bags with sand or anything other than water for any purpose.

The last two lines on page 4 of the Supplemental Examiner's Answer state:

Further, it is old and well known that highway barriers are commonly filled with water or sand to act as an impact-attenuating ballast, to reduce the chances of injury to a driver.

Appellant does not know what to make of this statement. Is this meant as an assertion of a teaching of the prior art that is relied upon to supplement the present rejections? If so, it is improper. Moreover, if so, just what does a highway barrier intended to keep vehicles on the road surface have to do with the prior art cited against Appellant's claims?

The last five lines on page 5 of the Supplemental Examiner's Answer state (emphasis in original):

Appellant further suggests "The differences in the structural and dynamic characteristics of a flexible water-filled structure . . . versus a rigid structure filled with solid material is manifestly apparent to the skilled artisan".

However, appellant has not cited any actual claim language germane to the argument made. What structural differences are being put forth?

However, claim 1 subparagraph (d) for example requires "fill material solids held inside the ballast tubes." Claim 1 element (e) also requires that "the fill material solids are held in position by the ballast tubes". Appellant respectfully submits that these are structural differences.

The first two lines on page 6 of the Supplemental Examiner's Answer state:

And how do the claims preclude the structural features of the prior art from reading on the claimed invention?

The premise of this question is itself incorrect. It should not be whether the prior art reads on the claims. The question to be answered is whether the claims read on the prior art when the prior art is properly read as a whole against the background of what is suggested to the person of ordinary skill in terms of combining some elements from some references with other elements from other references. The Supplemental Examiner's Answer apparently contends that merely because it is possible to find structural features of the claims in at least two references, that suffices to render those claims invalid under Section 103(a). Manifestly, that is not the law.

As to the conclusion reached in the top portion of page 7 of the Supplemental Examiner's Answer, it is fairly summarized by saying that because Dooleage uses two side-by-side bags, then the person of ordinary skill would thereby be motivated to use two side-by-side Bradley geotubes of desired height. However, this conclusion again sidesteps the incompatibility of the water filled bags of Dooleage and the way they interact versus the Bradley geotube containing solid fill material. The Dooleage bags are flexible, and thus the shapes are deformable such that by constricting the outer envelope, one possibly can squeeze the tubes into a shape other than the shape that would be assumed without constricting the outer envelope. However, a Bradley geotube filled with solid fill material does not react in the same manner as the Dooleage bags filled with water. This is one of the reasons that Appellant contended that the person of ordinary skill would not be motivated in the manner suggested by the

Supplemental Examiner's Answer, which ignores the laws of physics as applied to an incompressible liquid contained within an impermeable envelope as in Dooleage versus solid fill materials that can be packed more tightly together or less so as in Bradley.

The Supplemental Examiner's Answer states as the last two sentences of the middle paragraph on page 8 thereof that:

However, Dooleage clearly teaches the use of an elongated container (13) containing at least one ballast tube (11, 12), are advantageously deployed as a small dam even in rough water courses, than a single geotube". Therefore, the motivation is self-evident and not based on hindsight reasoning.

The continued insistence that a water-filled tube (11, 12) in Dooleage can constitute a ballast tube in a water course, when that statement itself contradicts the definition of ballast, speaks volumes about the inadequacy of the asserted combination that supposedly would be made by persons of ordinary skill.

Line 10 on page 9 of the Supplemental Examiner's Answer states:

However, Claims 76, 77 do not require fill material of any kind.

However, this statement is incorrect insofar as it ignores two facts. First, claims 76 and 77 are drawn to a "water barrier." Second, claims 76 and 77 require "at least one ballast tube." By definition, for a structure to function as a ballast tube in a structure that is a water barrier, the tube must contain fill material rather than water. For water does not provide ballast in a water barrier. Dooleage uses water in its bags, not to provide ballast but rather to provide a fluid that absorbs mechanical energy contained in a wave that strikes the Dooleage structure. The Examiner's Answer and the Supplemental Examiner's Answer cannot seem to appreciate this distinction. This

deficiency perhaps explains why the Supplemental Examiner's Answer states at page 10, lines 5-6 that (emphasis in original):

one only need to read Claim 76 to see the rejections are written to address the structural features of the claimed invention as claimed.

Moreover, the failure to appreciate the above-noted distinction concerning Dooleage also possibly explains why the last sentence on page 11 of the Supplemental Examiner's Answer concludes that:

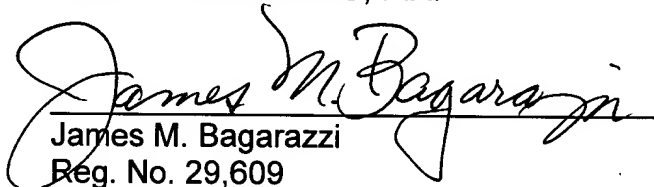
It is a matter of common sense, to fill a "barrier bag" with either water or sand, as a ballast, solely based upon the intended use, and the most readily available ballast material.

Appellant repeats its request to reverse the final rejections and allow the pending claims to issue as a patent.

Respectfully submitted,

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DATED: Sept 19, 2006

  
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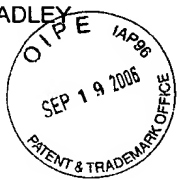
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
Re: Appeal to the Board of Patent Appeals and Interferences

In re Application of:

ANTHONY S. BRADLEY

Serial No.: 09/612,810

Filed: July 10, 2000



) Examining Attorney: Raymond W. Addie

) Group Art Unit: 3671

) Our Customer ID: 22827

) Our Account No.: 04-1403

Title: APPARATUS AND METHOD FOR DEPLOYING GEOTEXTILE TUBES

Sir:

1. ☐ **NOTICE OF APPEAL:** Pursuant to 37 CFR 41.31, Applicant hereby appeals to the Board of Appeals from the decision dated \_\_\_\_ of the Examiner twice/finally rejecting claims \_\_\_\_.
2. ☐ **BRIEF** on appeal in this application pursuant to 37 CFR 41.37 is transmitted herewith (1 copy)
3. ☐ An **ORAL HEARING** is respectfully requested under 37 CFR 41.47 (due within two months after Examiner's Answer).
4. ☒ Reply Brief under 37 CFR 41.41(b) is transmitted herewith (1 copy).
5. ☐ "Small entity" verified statement filed: ☐ herewith ☐ previously.
6. **FEE CALCULATION:**

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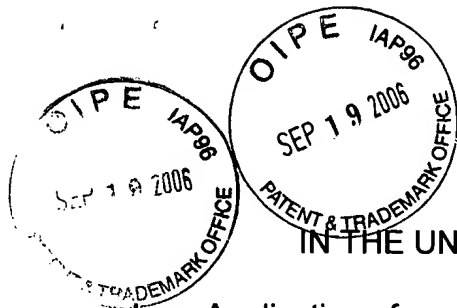
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Signature: James M. Bagarazzi

Date: Sept 19, 2006



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ANTHONY S. BRADLEY

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) Examining Attorney: Raymond W. Addie  
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Title: APPARATUS AND METHOD FOR DEPLOYING GEOTEXTILE TUBES

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Date of Deposit: September 19, 2006

I hereby certify that the enclosed documents and/or fees are being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 CFR 1.10 on the Date of Deposit indicated above and is addressed to: MAIL STOP APPEAL BRIEF- PATENTS, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

Denise R. Ginn

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(Signature of person mailing paper or fee)